Supreme Court, U. S.
FILED
SEP 26 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-318

DALLAS POWER & LIGHT COMPANY, TEXAS ELECTRIC SERVICE COMPANY, TEXAS POWER & LIGHT COMPANY,
Petitioners,

v.

CENTRAL POWER AND LIGHT COMPANY, PUBLIC SERVICE COMPANY OF OKLAHOMA, SOUTHWESTERN ELECTRIC POWER COMPANY, WEST TEXAS UTILITIES COMPANY, CITY OF ALTUS, OKLAHOMA, CITY OF FREDERICK, OKLAHOMA, CITY OF CORDELL, OKLAHOMA, CITY OF MANNFORD, OKLAHOMA, VERDIGREE VALLEY ELECTRIC COOPERATIVE, INC., INDIAN ELECTRIC COOPERATIVE, INC., MUNICIPAL ELECTRIC SYSTEMS OF OKLAHOMA, ARKANSAS ELECTRIC COOPERATIVE CORPORATION, FEDERAL ENERGY REGULATORY COMMISSION, HOUSTON LIGHTING & POWER COMPANY, CITY OF SAN ANTONIO, LOWER COLORADO RIVER AUTHORITY, *Respondents.*

BRIEF OPPOSING CERTIORARI

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September 26, 1978

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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BRIEF OPPOSING CERTIORARI

Respondents, Central Power and Light Company, Public Service Company of Oklahoma, Southwestern Electric Power Company and West Texas Utilities Company, respectfully pray that the Court deny certiorari of the decision of the United States Court of Appeals for the District of Columbia Circuit, entered herein on April 10, 1978.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 575 F. 2d 937 (D.C. Cir. 1978). The court of appeals denied "Petitioner's Petition for Rehearing and Alternatively Suggestion for Rehearing En Banc" in an unreported order. The decision of the Federal Power Commission (now the Federal Energy Regulatory Commission) ("Commission" or "FPC"), issued July 21, 1976, in Federal Power Commission Docket No. E-9558, is unreported. The Commission's order denying a rehearing, issued September 17, 1976, is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on April 10, 1978. A timely petition for a rehearing *en banc* was denied on May 26, 1978. The petition for certiorari was filed August 24, 1978, and received by these Respondents on August 28, 1978. Petitioners seek to invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1) (1976) and § 313(b) of the Federal Power Act, 16 U.S.C. § 825l(b) (1976).

STATUTORY PROVISIONS INVOLVED

Sections 201 and 202 of the Federal Power Act, 16 U.S.C. § 824 and § 824a (1976), are set forth as Appendix E to the petition for certiorari.

ISSUE PRESENTED

Should certiorari be granted to review a decision by a court of appeals remanding a case to an administrative agency for the purpose of having that agency articulate the rationale for the determinations made by that agency and take into account such factors as are appropriate to any such determination, where the initial decision of the agency:

> (1) is, on its face, based upon uncertain, if not conflicting, rationales;
>
> (2) fails, without explanation, to give any consideration whatever to substantial allegations of anticompetitive conduct bearing upon the issues before the agency; and
>
> (3) appears to have been based, at least in part, upon factual determinations made in the absence of any hearings whatever;

and no disposition of the case on remand can result in any precedent affecting anyone other than certain Texas public utilities?

STATEMENT OF THE CASE

Before the agency and in the court of appeals, this case involved the Commission's jurisdiction, and exercise thereof, under Section 202 of the Federal Power Act, 16 U.S.C. 824a (1976), to promote, encourage, maintain and direct interconnection between electric utilities in the face of agreements, coercive acts and other illegal conduct designed to avoid such jurisdiction.[1] The only question now pending is whether this Court should exercise its discretion to issue a writ of certiorari to review a routine disposition by a court

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[1] As used in this brief, the terms "interconnection" and "power pool" have the following meanings. "Interconnection" refers to the physical connection of electric power lines so that electricity may be transmitted from one line to the other. "Power pool" refers to a group of interconnected power generating or transmitting entities which in varying respects share their generating and transmission facilities with one another.

of appeals of a petition for review of Commission action. The court below was faced with a hastily drawn agency opinion based upon an uncertain or conflicting rationale and an apparent failure of the agency to consider the factors necessarily bearing upon the proper exercise of its responsibilities and containing factual determinations unsupported by any proper record. The court of appeals did no more than remand the case for clarification of the Commission's reasoning and assurance that all factors relevant to the rationale ultimately employed are given due consideration. As such, the case is inappropriate for review by certiorari.

The recitation of the case that follows is based upon the thin record below—a record based on the pleadings before the agency and other documents of public record since the agency held no hearings at any time in connection with its disposition of the case. In this context, Petitioners' claim in their "Statement of the Case" that "all facts relevant to the resolution of the jurisdictional status of DP&L, TESCO, and TP&L under the Act are admitted by all parties" is totally unfounded. *See* Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit at 3 (No. 78-318, October Term, 1978) (hereinafter cited as "Pet."). These Respondents do not now make, and never below made, any such alleged "admission". To the contrary, there are disputed issues of fundamental fact relating to the jurisdictional determination and to associated anticompetitive conduct by Petitioners which, by their very nature, are best explored in a hearing, or at least, deserve close scrutiny by the Commission. It is the absence of any such exploration or close scrutiny that, in major part, led the court of appeals to remand this

case. 575 F.2d at 938-39. The petition boldly evades any mention of anticompetitive considerations and thus compels their discussion in the following statement of the case. In light of these omissions, Petitioners' characterization of the jurisdictional facts must be wholly disregarded. It merely discloses a complete loss of perspective and tunnel vision as to the relevant law and facts.

Two of the four C&SW Companies[2] have their retail service areas wholly in Texas: WTU and CP&L. The combined generating capacity in Texas of HL&P[3] and the TU Companies,[4] the utilities which have resisted interconnection with the outside world, is more than six times greater than that of WTU and CP&L. Thus HL&P and the TU Companies dominate the bulk or wholesale power market in Texas.

Before May 4, 1976, WTU, CP&L, the TU Companies and HL&P, together with the cities of Austin and San Antonio, the Lower Colorado River Authority and a few others comprised the Texas Interconnected System ("TIS") (also known, with the addition of certain municipal and cooperative systems, as the

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[2] Central Power and Light Company ("CP&L"), Public Service Company of Oklahoma ("PSO"), Southwestern Electric Power Company ("SWEPCO") and West Texas Utilities ("WTU") are all operating electric utility subsidiaries of Central and South West Corporation ("C&SW") and are collectively referred to herein as the "C&SW Companies".

[3] "HL&P" stands for Houston Lighting and Power Company.

[4] The Petitioners Texas Electric Service Company ("TESCO"), Texas Power and Light Company ("TP&L"), and Dallas Power and Light Company ("DP&L") are all operating subsidiaries of Texas Utilities Company and are collectively referred to herein as the "TU Companies".

Electric Reliability Council of Texas ("ERCOT")). ERCOT is contiguous to, but not interconnected with, the Southwest Power Pool ("SWPP"), which, in turn, is fully interconnected with the entire interconnected electric power network covering roughly the Eastern two-thirds of the United States.[5] Beginning with the period immediately preceding the effective date of the enactment of Part II of the Federal Power Act, the major Texas utilities have attempted to isolate their operations (except under numerous, broad exemptions conferred by the Commission) from any contact with interstate electrical energy. ERCOT is the *only* power pool in the United States which attempts to operate in such isolation.

Before passage of Part II of the Federal Power Act, interconnections existed between the TU Companies and WTU (the service territories of which are wholly in Texas), on the one hand, and certain Oklahoma, Louisiana and Arkansas electric systems on the other. Interconnections also existed between HL&P and interstate systems to the East. Before Part II of the Federal Power Act became effective, the TU Companies and HL&P instigated a plan to isolate their operations from any contact—direct or indirect—with interstate flows of electricity for the purpose of evading the impending jurisdiction of the Commission. This action had the effect of insulating them from compe-

[5] The far Western states are interconnected among themselves but are connected with the Eastern part of the nation through interconnections which are inadequate to provide continuous integrated operations. *See* Congressional Research Service, 94th Cong., 2d Sess., National Power Grid System Study, An Overview of Economics, Regulatory, and Engineering Aspects, 117 (Comm. Print 1976).

tition from utilities operating in interstate commerce in electricity. These utilities severed existing interconnections and jointly refused to deal (interconnect) with any electric power system which was not electrically isolated from electric systems outside Texas and which would not agree to open its interconnections to avoid participation—direct or indirect—in interstate flows of electricity.

The restraints upon the free flow of electricity across state lines were imposed by a combination of companies, including DP&L, TESCO, TP&L and HL&P and could not have been maintained by any single company. These companies rely upon each other heavily for support in the provision of economic, reliable service. Thus, by operating in combination, HL&P and the TU Companies save the enormous expenses inherent in individual, isolated operation.

But the price which these companies have exacted from anyone desiring the benefits of interconnection with them is adherence to their boycott of all companies dealing with interstate utilities.[6] Speaking of these

[6] For example, the written Interconnection Agreement between TESCO and WTU effectively requires a boycott of all who deal with those engaged in interstate transmission or sale of electricity. The relevant provisions read:

> The parties hereto agree that no power or energy transmitted, purchased, sold, delivered or received hereunder by either party hereto is to be transmitted, purchased, sold, delivered or received in interstate commerce, and the parties hereto agree at any time and from time to time to open all the transmission line connections necessary to prevent such transmission or delivery by either party to the other in interstate commerce. The parties further agree that no power or energy will be delivered by either of them to the other under this agreement except power or energy generated within the State of Texas, and that

conditions, the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice has formally[7] advised the Nuclear Regulatory Commission ("NRC") that:

> The competitive consequences of this agreement are the same as those that flow from any group boycott: actual and potential competition are injured. Actual competition suffers when existing systems are disconnected from HL&P and TU, as occurred during May, 1976-May, 1977. Potential competition is foreclosed by reason of adherence to the unconditional, across-the-board ban of all interstate connections regardless of their technological and economic feasibility.[8]

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neither party will transmit any power of energy delivered to it hereunder beyond the limits of the State of Texas or sell any such power or energy for transmission or consumption beyond the limits of said state. Appendix of Central Power and Light Company et al. in *Central Power & Light Co. et al.* v. *Federal Power Commission*, No. 76-1995 (D.C. Cir. May 20, 1977) at 164.

[7] *See* Section 105(c) of the Atomic Energy Act, 42 U.S.C. § 2135 (c) (1970).

[8] Letter of February 21, 1978, to Howard K. Shapar, Executive Legal Director, Nuclear Regulatory Commission, from John H. Shenefield, Assistant Attorney General, Antitrust Division, U.S. Department of Justice re: NRC Dkt. Nos. 50-498A and 50-499A (S. Texas Project), 8-9, Appendix A at 10a. This letter is set forth in full in Appendix A to this brief. The February 21, 1978, letter concerns the operating license for the South Texas Project, Units No. 1 and No. 2, of which HL&P is the managing participant. CP&L is a participant in that project. Another letter to the same effect, dated August 1, 1978, concerns the operating license for Comanche Peak Steam Electric Station, Units No. 1 and No. 2, in which the TU Companies are joint participants. A hearing has been ordered already with regard to the South Texas Project by the NRC. The NRC is considering the Department of Justice advice with regard to the Comanche Peak Station.

> . . . with the increased importance of economic coordination brought about by the fuel situation, and the corresponding increased need and opportunity for coordination between interstate and intrastate utilities, HL&P, together with TU, by agreeing not to interconnect with utilities operating in interstate commerce have the power to and may adversely affect the future competitive situation, in or contiguous to the State of Texas, both between the intrastate systems and between the interstate and intrastate systems.[9]

A central basis for remand of this case by the court of appeals was the failure of the FPC to come to grips in any way with these and related anticompetitive issues either in the context of an informed exercise of discretion or in the context of attempted termination by the TU Companies and HL&P of jurisdictional interconnection by means blatantly in violation of the antitrust laws. The court of appeals correctly refused to adopt the narrow view which Petitioners urged there (several times), as well as here, that jurisdiction (whether discretionary or otherwise) could be summarily terminated by gross violations of the antitrust laws and disregard of the public interest in cost savings available through interconnected operation.

Immediately prior to the institution of proceedings before the Commission, WTU began to provide wholesale service between Oklahoma and Texas by transmitting power to certain Oklahoma communities utilizing facilities previously confined to intrastate service. That same day, May 4, 1976, the C&SW Companies commenced these proceedings before the Commission,

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[9] Appendix A, 14a-15a.

alleging that the TU Companies and HL&P were "public utilities" within the meaning of the Federal Power Act and requesting appropriate orders for maintenance of existing interconnections and for additional interconnections with those utilities under § 202 (b) of the Federal Power Act and an investigation of voluntary interconnection under § 202(a) of that Act.

Shortly thereafter, counsel for the C&SW Companies informed the TU Companies and HL&P that CP&L and WTU (with which they were interconnected) were, by reason of WTU's service to Oklahoma, operating in interstate commerce. In mid-afternoon, the TU Companies and HL&P severed their interconnections with neighboring systems connected directly or indirectly to CP&L or WTU. These actions were taken in spite of the fact that the power flows from WTU to Oklahoma were relatively small in terms of the total interconnected system and certainly had no negative affect upon its reliability.

Subsequently, after motions by several parties for the holding of hearings with respect both to permanent and temporary interconnection, the filing of various interventions and other developments, the Commission issued an order on July 21, 1976, adopting and incorporating a memorandum of its general counsel (the "Memorandum") to the effect that the TU Companies and HL&P were not "public utilities" (subject to Commission jurisdiction). That Memorandum contains the only justification for the Commission's jurisdictional determination. The propriety of that determination was the central issue in the appeal of the Commission's Orders filed by the C&SW Companies. The rationale for that determination as set forth in the

Memorandum is, at best, most unclear.[10] For this reason, the court of appeals remanded the matter to the Commission. 575 F.2d at 938.

In addition, the court of appeals found that the FPC had failed to address the central issue whether the agreement among the utilities in Texas not to transmit electric energy to or from any person involved in interstate commerce was part of a group boycott in violation of the policies, if not the letter, of the antitrust laws. 575 F.2d at 938.

The decision of the court of appeals raises no issue that could be of interest or importance to any significant utility involved in electric generation other than Petitioners and HL&P, which have since 1935 sought

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[10] The principal rationale of the Commission as contained in the Memorandum appeared to be that the "overall characteristics" of the power systems operated by the TU Companies and HL&P were intrastate in nature and, thus, this was a proper case for the Commission to decline to assert jurisdiction over them. No valid support for this rationale can be found in either the statute or the cases decided thereunder. (Moreover, any determination based upon the "overall characteristics" of these companies could not have been reached in any informed manner since the record was, to say the least, most incomplete.) Understandably the Commission abandoned this rationale on appeal and argued that its determination was, for all intents and purposes, *mandated* by WTU's supposed violation of its contract with TESCO. (It did so despite the fact that the authorities relied upon in the Memorandum in connection with the "overall characteristics" test support the view that assertion of jurisdiction is a matter left to the sound *discretion* of the Commission.) However, even on appeal the Commission offered no explanation for its subservience to the provisions of a contract, the legality of which was contested. Instead it simply assumed the validity of these provisions and concluded that its regulatory duties were subordinate to such private arrangements. In any event, this new rationale was not employed by the Commission when it in fact made its jurisdictional determination.

to evade Commission jurisdiction through an illegal conspiracy to isolate ERCOT from the rest of the country. The action of the court of appeals was the mildest and least intrusive possible disposition of a patently inadequate Commission decision—a decision made by delegation to its general counsel, fraught with confusion about the existence and exercise of discretionary jurisdiction and lacking even mention of antitrust and other public interest considerations.

REASONS FOR DENYING THE WRIT

1. The Court of Appeals Acted Properly in Remanding the Jurisdictional Determination

Petitioners' first and principal argument is that the court of appeals erred by remanding the jurisdictional determination to the Commission when, as a matter of law, it was required to resolve the jurisdictional issue. (Pet. at 9-12). There is no such rule of law, and no legal error was committed. The petition's strenuous argument for avoiding remand can be motivated only by a desire to avoid exploration of anticompetitive and other public interest issues by the Commission. At this stage, the case is a dispute between private parties involving anachronistic practices, unworthy by traditional standards of this Court's attention, particularly in light of the matters of contemporary pressing national concern that crowd the Court's docket.

As a matter of Supreme Court jurisprudence, Petitioners' argument on its face does not reveal a meritorious claim for certiorari. Even if it were true that the court of appeals had "erred" legally—and it did not—a mere error of law below is not cause for grant of certiorari. *See* Sup. Ct. Rule 19(b). Petitioners would have this Court treat certiorari as if the writ

should issue for any routine claim of legal error. This Court's time and attention cannot be so lightly spent.

Further, the authority cited by Petitioners for their claim of legal error lends no support to their claim. Neither the court of appeals nor any party claims that the agency alone is to make the final and exclusive jurisdictional determination here. *See Social Security Board* v. *Nierotko*, 327 U.S. 358, 369 (1946). Nor did the court of appeals decide that there is to be no judicial review of the agency determination. *See Stark* v. *Wickard*, 321 U.S. 288, 309-10 (1944). Instead, the court of appeals found that the agency decision, due to its lack of clarity, did not enable the court to perform its reviewing function. No judicial function was delegated to the agency; the court of appeals required the agency to explain adequately its decision. After such explanation, and the development of an adequate record, the court can perform its proper function and examine the jurisdictional determination in light of the statutory requirements.[11]

But Petitioners' core argument is that a remand is unnecessary because the Commission had no discretion

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[11] The suggestion (Pet. at 10) that the court of appeals demanded ideal clarity is refuted by any fair reading of the opinion of the general counsel upon which the Commission's action was based and upon which, exclusively, it must be defended. *Bowman Transportation* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974), is not to the contrary. While this Court did speak of upholding agency action of "less than ideal clarity", it emphasized in the very same sentence that "we may not supply a reasoned basis for the agency's action that the agency itself has not given. . . ." 419 U.S. at 285-6, citing *SEC* v. *Chenery*, 332 U.S. 194, 196 (1947). And it was *Chenery* that was the legal basis for the court of appeals' action here. *See* 575 F.2d at 938.

to assert jurisdiction. (Pet. at 10-11).[12] Petitioners must have achieved this insight *after* they briefed their case to the court of appeals, for there they argued (at p. 28):

> In the proceeding presently before this Court, the Commission has properly exercised its discretion and found, on the basis of uncontroverted facts that the TUS companies are not engaged in the interstate transmission or sale of electric energy and are therefore not public utilities subject to its jurisdiction. Brief of DP&L, TESCO, and TP&L, *Central Power & Light Company, et al.* v. *Federal Power Commission,* No. 76-1995 (D.C. Cir. May 20, 1977).

The TU Companies then believed that a discretionary test was involved, and, although it now finds it convenient to argue to the contrary, its prior representations to the court below confirm at least that the court of appeals was sound in reaching the judgment that the agency rationale was most obscure. If the court below found confusion, the TU Companies shared in, and contributed to, this confusion, and may not now be heard to complain of its consequences.

This is neither the time nor the place for the C&SW Companies to attempt to explicate the Memorandum. On its face the Memorandum reveals that it was pre-

[12] Petitioners contend that the court was confused by the argument of counsel for the Commission that, *as a matter of discretion,* the Commission declined to assert jurisdiction. This contention is wholly unfounded. The court was in no way confused by the arguments of the Commission's appellate counsel. It was, however, understandably unable to discern what the Commission's position was with respect to the existence of discretion *based upon the contents of the Commission's Order.*

pared in haste in a single day, leaving no time for a proper investigation of the facts or, one might suspect, the applicable law. There were no hearings to inform the agency or the general counsel. Even if it were proper to base a jurisdictional determination solely on this apparently meager investigation by a member of the staff, the opinion of the general counsel is notable for its lack of clarity and its confusion over the legal standards to be applied.[13]

The C&SW Companies argued to the court of appeals that, under either a discretionary or non-discretionary standard, the Commission had applied the wrong legal test. The C&SW Companies contended that under the test of *FPC* v. *Florida Power & Light Co.,* 404 U.S. 453 (1972), federal jurisdiction follows the flow of interstate energy, irrespective of the amounts involved. Once such flows occur, no further inquiry is necessary. Finally the C&SW Companies argued below that such jurisdiction, once vested, could not be terminated by illegal acts.[14]

Assuming, however, that a principle of discretion governs the assertion of jurisdiction, the C&SW Companies argued below that *a fortiori* jurisdiction must

[13] Its lack of clarity was revealed best by the five briefs filed in opposition to the C&SW Companies' brief in the court of appeals, which among themselves differed dramatically in their statement of the opinion's meaning.

[14] In making this contention the C&SW Companies did not rely solely on the illegal disconnections of May 4, 1976. The C&SW Companies believe that a proper hearing would show that *ab initio* the withdrawal of the TU Companies and HL&P from interstate commerce was the result of a scheme violative of the federal antitrust laws.

exist.[15] The question of discretion could never arise unless the interstate transmission which had occurred was sufficient to create jurisdiction.[16] Thus, the existence of jurisdiction had to be conceded, and the proper question was only whether the FPC should *exercise* that jurisdiction. In those circumstances consideration in hearings of the totality of the circumstances surrounding the interstate transmission is not only proper but *necessary* to the exercise of any informed discretion. Under a discretionary standard, the FPC must fully consider factors, such as anticompetitive activities and potential savings to customers, going beyond the mere duration or volume of any transmission of electric energy from one state to another. *See Gulf States Utilities* v. *FPC,* 411 U.S. 747, 758-59 (1973).

While not deciding which test applies, the court of appeals agreed that antitrust considerations could not be ignored if the Commission relied on a discretionary standard: "[A]ntitrust considerations are relevant when it [the Commission] exercises its discretion subject to a public interest mandate." 575 F.2d 938. As the

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[15] In any event, irrespective of the existence of discretion as to the assertion of jurisdiction over the TU Companies and HL&P, the Commission, of necessity, had jurisdiction to determine the scope of such substantive powers.

[16] Indeed, portions of the Memorandum appear to assume this to be the case.

> "During May 4, 1976, from 5:30 a.m., to 3:43 p.m., the aforementioned four systems operated in parallel—or electrical synchronizism [SIC]—with other electric utilities which transmitted or sold electric energy generated in one state and consumed in another, and, therefore, they were susceptible to review by the Commission as to their 'public utility' status."

Memorandum, Pet. at c-15 and c-16.

court of appeals noted, "there is no evidence in the record that the FERC considered Petitioners' antitrust contentions." *Id.* Upon remand, the court instructed the Commission that in the event "exercise of discretion is involved . . . it must be accompanied by some indication in the record that all relevant factors were taken into account." 575 F.2d at 939. This is consistent with a long line of authority from this Court, including *Gulf States Utilities, supra.* It is clearly not error.

Contrary to Petitioners' claim (Pet. at 12) a remand serves a worthy purpose. It permits the Commission to scrutinize closely Petitioners' anticompetitive behavior, which for too long has been a major barrier to the efficient and economical flow and distribution of the nation's energy resources and to order appropriate relief. Given their record of anticompetitive conduct and insistence upon intrastate isolation, irrespective of the effects of that isolation on the public interest, Petitioners' efforts to overturn the judgment of the court of appeals and thereby avoid any examination of their actions by the Commission, are quite understandable. Petitioners' desires, however justified as a matter of self-interest, provide no basis for intervention by this Court.[17]

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[17] There can be no serious contention that the court's mild and balanced response here is in any way comparable to the judicial overreaching which this Court criticized and reversed in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.,* 98 S. Ct. 1197 (1978). There the court of appeals ordered an agency to engraft upon its procedures its own notions of what fairness required even after the agency had held extensive hearings. The court was asking an agency to do far more than was required by the Administrative Procedure Act and by its own regulations. This Court reversed and pointed out that a court could not demand of an agency more than what the controlling statute and administrative due process require. In the present case,

2. Petitioners' Contention That the Decision of the Court of Appeals Is in Conflict with the Decision of This Court in *Connecticut Light & Power* Co. Is Frivolous

Petitioners now argue, as they have several times before, that by disconnecting electric service along the hundreds of miles where their service territory borders that of the C&SW Companies or intervening utilities in Texas, the TU Companies ousted the FPC of jurisdiction under the Federal Power Act. (Pet. at 14-16). In making this argument Petitioners studiously avoid any reference to the obvious fact that this action constituted a violation of the policies, if not the letter, of the antitrust laws, and was taken in blatant disregard of the public interest. It is only by so disregarding the obvious that Petitioners can assert that the decision below somehow conflicts with this Court's decision in *Connecticut Light & Power Co.* v. *FPC*, 324 U.S. 515 (1945).

Whatever might have been the situation with respect to a *single company's plans* for *orderly withdrawal* from interstate commerce (as was the case in *Connecticut Light & Power Co., supra*), the Commission cannot be ousted of jurisdiction by concerted implementation of a long-standing conspiracy violative of the antitrust laws, designed to escape federal jurisdiction and having the effect of injuring competition. No case requires the Commission to stand idly by when private entities, such as Petitioners and HL&P, elect

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the agency failed to do what the statute required or to hold any hearings. The record is plainly inadequate by any standard and the agency did not comply with its minimum legal obligation to articulate its reasoning. *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943). This is vastly different than requiring the superfluous procedures rejected in *Vermont Yankee*.

to so flout the public interest. Thus, *Connecticut Light & Power* in no way supports Petitioners' contentions. Indeed, even in that case this Court remanded the question of the propriety of assertion of jurisdiction to the Commission for the exercise of informed discretion. Its dicta that a single company's plans for orderly withdrawal from interstate commerce may not be improper are entirely irrelevant to the facts of this case. The simple request here by the court of appeals for the FPC to clarify the question if, how and when discretion was exercised, as well as to elucidate its views regarding the closely related antitrust and public interest questions, was inescapable.

3. There Is No Basis for Supreme Court Review Based on the Asserted Conflict with Statutory Language and Intent

Petitioners would invent a new standard for certiorari by suggesting that the remand conflicted with clear statutory language and intent. Such a standard is not supported by reference to a single case or legal authority or, for that matter, by this Court's rule suggesting the appropriateness *vel non* of cases for certiorari. Sup. Ct. Rule 19. Such a contention could be made by *any* unhappy litigant, and would lead to burying the Court in trivial litigation. Here the asserted conflict inflicts no injury since, upon remand, the agency, upon a proper record, could presumably adopt Petitioners' theory. Then, at least, the theory could be judicially tested with the benefit of a proper examination by the agency. But the court's remand *per se* neither conflicts with the statute nor causes Petitioners any cognizable injury.

Nor is there merit to the substance of the TU Companies' argument. The TU Companies' facilities were

used quite recently for the transmission of energy in interstate commerce, on May 4, 1976 at the very least. Decisions of this Court have rejected any *de minimis* test. Once an interstate flow of electricity occurs, no matter how small, FPC jurisdiction attaches. *See FPC* v. *Florida Power & Light Company, supra; Accord, Jersey Central Power & Light Co.* v. *FPC,* 319 U.S. 61 (1943).

Petitioners err fundamentally in ignoring the actions attempting to terminate the flows, both on May 4, 1976, when the group boycott was enforced, and in 1935, when the anticompetitive arrangements to evade FPC jurisdiction began. The authorities cited by Petitioners do not concern concerted withdrawals from service in furtherance of anticompetitive schemes to restrain the interstate flow of electricity.

Even recognition of the right of a utility unilaterally to withdraw from interstate commerce would not establish any principle that FPC jurisdiction ends when utilities act in concert to withdraw from interstate commerce to enforce a scheme to avoid the consequences of interstate power flows. That different case is presented here. To hold otherwise is to conclude that FPC jurisdiction may be evaded by violation of federal law —here the Sherman Act.

Further, even assuming that jurisdiction were lawfully terminated when the TU Companies and HL&P abruptly brought about the massive disconnections here involved, it does not necessarily follow that the FPC was powerless to act on the C&SW Companies' requests which were made prior to such termination. The operative language of the Act requires only that a public utility own facilities for the transmission of power in

interstate commerce. The facilities owned by HL&P and the TU Companies are such facilities in design and capacity and in actual use on May 4, 1976, and other occasions. The discretion of the FPC to exercise its powers retroactively with respect to those periods when a company was a "public utility" has been recognized by the Supreme Court. *Connecticut Light, supra,* 324 U.S. at 535. There, the FPC, in declining to exercise these powers, gave most thorough consideration to the impact of doing so and concluded only that little public purpose would be served. *Connecticut Light & Power Co.,* 6 F.P.C. 104, 108-10 (1947). Here the case for retroactive assertion of jurisdiction would be quite different, yet the Commission gave the matter no consideration whatever.

Finally, the suggestion of the TU Companies that interstate interconnection somehow involves a "delicate balance" between national and local regulation is untenable. (Pet. at 12). Nothing in the Federal Power Act or any decision of this Court thereunder requires, or even suggests, such a conclusion. Indeed, nothing could be more clearly within the federal domain than the transmission of electric energy across state lines.[18] For these reasons the disposition by the court of appeals is at the very least an appropriate response to the confusion and intolerable results which have flowed from the Commission's Orders in this case.

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[18] It should be noted that the Public Utility Commission of Texas has attempted to embargo such transmissions. *See* Pet. at 6 n.3 and Appendix F thereto. That action of the Texas Commission—now on appeal—is unconstitutional.

4. Grant of Certiorari Would Not Settle Any Principles of General Application

Despite the exaggerated claims of Petitioners (Pet. at 16-17), a decision on the merits of the jurisdictional question will, for practical and legal reasons, be of slight legal consequence except to the parties to this case. As a matter of law, given this Court's decision in *Florida Power & Light,* as well as its earlier decision in *Jersey Central Power & Light,* few, if any, privately owned electric utilities are lawfully exempt from Commission jurisdiction. This was recognized by Justice Douglas' dissent in *Florida Power & Light* which clearly perceived and unsuccessfully urged rejection of the broad jurisdictional standard that this Court ultimately adopted. (404 U.S. at 474 n.4; *see generally* 404 U.S. at 469-76).

But as a practical matter, interconnection has been widely accepted throughout the electric utility industry as having obvious public benefits, including a reduction in the size of generating reserves, improvements in system reliability and interchanges of power between utilities so that low-cost sources can be used to greatest benefit. Because of the obvious benefits of interconnection, electric systems from the Rocky Mountains to the Atlantic Ocean are now all effectively and continuously interconnected with a single notable exception: ERCOT, *i.e.,* those systems involved here. Congressional Research Service, 94th Cong., 2d Sess., *The Electric Reliability Council of Texas Intertie Situation,* 1 (Comm. Print 1976). The states west of the Rockies are also interconnected with one another but only imperfectly with the East. Thus, a decision on the jurisdictional standards will be without practical consequence except to these parties.

Given the fact of interconnection everywhere else, the situation here is unlikely to reoccur; the Commission will not be faced with similar questions in any future cases. Thus, a ruling by this Court on the question the TU Companies propose will have no consequences for the ability of the Commission to dispose of pending cases, and such a ruling would in no way affect the Commission's continuing administration of its organic statute.

This Court has consistently indicated that the writ of certiorari should not be granted "except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties . . . ." *Layne & Bowler Corp.* v. *Western Well Works, Inc.,* 261 U.S. 387, 393 (1923). *See, e.g., Rudolph* v. *United States,* 370 U.S. 269 (1962); *Rice* v. *Sioux City Memorial Park Cemetery, Inc.,* 349 U.S. 70 (1955); *NLRB* v. *Pittsburgh Steamship Co.,* 340 U.S. 498 (1951); *Magnum Import Co.* v. *Coty,* 262 U.S. 159 (1923). The application of that principle here requires denial of the petition for a writ of certiorari, as the questions presented by the petition are of interest and importance only to the parties litigating in this case.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 26, 1978

APPENDIX

APPENDIX A

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

Assistant Attorney General
Antitrust Division

February 21, 1978

JHS:DLF:JDW
60-415-105
Howard K. Shapar
Executive Legal Director
Nuclear Regulatory Commission
Washington, D. C. 20555

Re: Houston Lighting & Power Company; Public Service Board of San Antonio; City of Austin; Central Power and Light Company
South Texas Project, Units 1 & 2
NRC Dkt. Nos. 50-498A & 50-499A

Dear Mr. Shapar:

This responds to your letter of August 25, 1977, which seeks our advice on the competitive implications of issuing an operating license in the above captioned matter, pursuant to the Commission's determination under section 105 (c)(2) of the Atomic Energy Act that changed circumstances in the licensee's activities make further antitrust review advisable.

A. STATUS OF THE HOUSTON LIGHTING AND POWER APPLICATION

The South Texas Project (STP), located southwest of Houston, Texas in Matagorda County, will consist of two 1,250 mw nuclear powered generating units. There are four participants in the STP, each of whom will own undivided interests as tenants in common: Houston Lighting and Power (HL&P) will own 30.8 percent and is the project

manager; the City Public Service Board of San Antonio will own 28.0 percent; Central Power and Light (CP&L) will own 25.2 percent; and the City of Austin will own 16.0 percent. The addition of the STP will increase the combined generating capacity of the participants by approximately 15 percent and thus represents an important and substantial addition to the base-load capacity of the participants.

On October 22, 1974, the Department, after conducting an antitrust review of this nuclear plant in connection with HL&P's application for a construction permit, advised the NRC that an antitrust hearing would not be necessary. A construction permit was issued for the plant and, in early 1976 the construction permit proceeding was formally closed.

At the time of our prior letter of advice most of the electric systems in Texas interconnected and coordinated with one another to their satisfaction in the Texas Interconnected System (TIS). TIS was a group of nine electric systems interconnected through high voltage transmission facilities that operated throughout most of the state of Texas. TIS was comprised of six privately-owned and three publicly-owned systems. The privately-owned systems were Dallas Power and Light Company, Texas Electric Service Company, and Texas Power and Light Company,* Houston Lighting & Power Company (HL&P), Central Power and Light Company (CP&L), and West Texas Utilities Company (WTU). The three publicly-owned electric systems were Lower Colorado River Authority, City of Austin, and City Public Service Board of San Antonio.

As of October 22, 1974, TIS was ex[c]lusively an intrastate system; none of its members was interconnected with

* Dallas Power and Light, Texas Electric Service and Texas Power and Light are the operating subsidiaries of Texas Utilities Company. When used herein, "TU" refers to Texas Utilities Company and its various operating and service subsidiary companies.

an electric utility outside Texas so as to be subject to the jurisdiction of the Federal Power Commission, and interconnection contracts among TIS members were conditioned specifically to preclude any interstate connections. In the absence of complaints from any source, the Department had expressed no view as to the legality or propriety of this "intrastate only" policy.*

In May, 1976, two principal members of TIS, CP&L and WTU, commenced to operate in interstate commerce. HL&P and TU, acting pursuant to the contractual conditions noted above, immediately opened their electrical connections with CP&L, WTU, and other Texas systems which were also interconnected with CP&L and WTU. CP&L then filed a petition at the NRC to intervene and to hold an antitrust hearing. In connection with that petition the NRC, by letter of August 3, 1976, requested the Department's advice as to whether there were compelling circumstances which warranted an antitrust review prior to the filing of an operating license application. The Department responded on January 25, 1977, and advised that, on the basis of the situation then existing

> "—with restrictions on interutility coordination resulting from the division of the utilities in the state into two groups, premised on intrastate and interstate operation respectively, with TIS eliminated as a coordinating vehicle, and with questions raised as to the viability of planned participation in the nuclear units—"

an antitrust hearing was warranted.

After transmittal of our January 25, 1977 letter, the Commission, by Memorandum and Order dated June 15, 1977, ruled that it did not have jurisdiction to order a hearing *prior* to HL&P's filing an application for an operating li-

* See condition 11 of the license conditions attached to the Comanche Peak Steam Electric Station license, AEC Docket Nos. 50-445 and 50-446.

cense. The Commission did, however, make a determination that a further antitrust review would be advisable because of the significant changes in the licensee's activities that occurred after completion of the antitrust review at the construction permit stage. That determination, and HL&P's subsequent filing of an operating license application, provided the basis for you to once more seek the Department's antitrust advice with respect to the South Texas Project.

Your letter of August 25, 1977 requires the Department for the first time to render antitrust advice under the proviso of Section 105(c)(2). That proviso states that the Attorney General's antitrust advice will not be sought at the operating license stage where a construction permit has issued, unless the Commission determines such review is "advisable on the ground that significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous review . . . in connection with the construction permit for the facility."* Once the Commission has made the requisite determination then the Attorney General must conduct his review as contemplated by Section 105 (c)(1). That section provides that the Attorney General shall "render such advice to the Commission as he determines to be appropriate in regard to the finding to be made by the Commission pursuant to paragraph (5) of this subsection. Such advice shall include an explanatory statement as to the reasons or basis therefor." Thus, the Department's antitrust review at the operating license stage is no different than the review it would conduct at the construction permit stage and would not require the application of a standard different from that contemplated in Section 105(c)(5); that is whether there is a reasonable probability that the activities under the license would create or maintain a situation inconsistent with the antitrust laws.

* The licensee must have caused, or be reasonably responsible or answerable for the significant changes. Joint Committee on Atomic Energy, S. Rep. No. 91-1247, 91st Cong., 2d Sess. 29 (1970).

In addition to requesting our advice pursuant to Section 105(c)(2), you have also asked the Department to respond to certain questions raised by the Commission in its June 16, 1977, Order.

It should be noted at the outset that since the Department's advice letter of January 25, 1977, the members of TIS have reestabished their interconnections and are operating in much the same manner as they were at the time of our 1974 advice letters. The present situation is not voluntary, however, but is the result of an order of the Texas Public Utility Commission (TPUC), a state regulatory agency established in 1976 pursuant to the Public Utility Regulatory Act.* The TPUC, in May of 1977, ordered the members of TIS to reestablish the interconnections that existed prior to May 3, 1976. Since HL&P and TU were refusing to interconnect with any utility operating in interstate commerce, the TPUC ordered the utilities operating in interstate commerce to cease such operations and to reestablish interconnection with HL&P and TU. For the present, this has eliminated the severe operating problems that confronted the interstate utilities at the time of our January 25, 1977, advice letter.

B. The Competitive Situation

1. *The Department's Prior Antitrust Reviews*

Any analysis of present antitrust concerns must begin with the Department's prior antitrust review. The Department of Justice previously submitted to the Nuclear Regulatory Commission or its predecessor, the Atomic Energy Commission, antitrust advice with regard to three different construction permit applications that are relevant to the instant review. The Department first examined competitive relationships of electric utilities within Texas in connection with the application for Comanche Peak Steam Electric

* Title 32, Art. 1446(c), V.A.C.S.

Station, AEC Docket Nos. 50-445 and 50-446. In the course of that inquiry, the Department determined that various electric systems in Texas had formed the Texas Interconnected System (TIS).

As noted above, TIS was composed of nine members. HL&P was the dominant member in the southern portion of TIS and TU was the dominant member in the northern portion. Together they owned aproximately 75 percent of the generating capacity in TIS, accounted for approximately 75 percent of kwhr sales of electricity, and, more importantly, their service areas and transmission facilities were strategically located between the systems in south and central Texas with which they were interconnected and other systems that were not members of TIS to the north and east. Thus, HL&P and TU offered the only realistic opportunity for interconnection to these systems.

The members of TIS, up to that time, had not engaged in a great deal of coordinated development outside of that carried on between the integrated systems in TU. The principal reason for such relative independence was that the ready availability of inexpensive natural gas made extensive coordination unnecessary. A utility could produce a low cost reliable source of bulk power and thereby maintain its competitive position simply by installing gas-fired steam generating units. Thus, the Texas utilities enjoyed substantial independence, each installing capacity to meet its own load and reserve needs.

At that time the main function of TIS had been to provide emergency backup between the interconnected utilities and thus to increase the reliability of participants. Some cost savings were also realized. Members of TIS also conducted various studies relating to the need for, and the effects of, any future transmission and generation changes planned by the members. Thus, membership in TIS provided each member system the *opportunity* to obtain various benefits from coordination that were not available to

non-members. For example, the 1962 power interchange agreement between HL&P and TU provided for a form of staggered generation additions to obtain "certain mutual advantages in investment, efficiency and operation."

In the past, membership in TIS had not been available to all of the electric utility systems within Texas. It was the Department's view that membership in TIS was essential if the smaller electric systems were to compete effectively with the larger systems that were members of TIS. Thus, the Department sought to obtain for the smaller systems greater interconnection and coordination opportunities with the larger systems. In the Department's letter of advice concerning the Comanche Peak nuclear units, dated January 17, 1974, we advised that no hearing would be necessary if the Commission would impose certain license conditions, agreed upon by the applicant, that were designed to afford other utilities the opportunity for ownership participation in the Comanche Peak nuclear units, coordination and sharing of reserves with TU, and transmission services over TU facilities. The construction permit was subsequently issued with those license conditions attached.

The Department submitted its second advice letter on May 17, 1974, in connection with the Allens Creek Nuclear Generating Station, AEC Docket Nos. 50-466A and 50-467A. The application to construct the Allens Creek Station was filed by HL&P. In its letter, the Department noted that the restrictions on membership within TIS had recently changed and that membership was being made available to other systems. The Department also stated as follows:

> The Department has uncovered no evidence that would indicate that Applicant is attempting to prevent participation in the joint ownership of nuclear facilities by any system or is otherwise presently impairing the competitive opportunities of other systems.

The Department's advice letter in Allens Creek concluded that no antitrust hearing was necessary.

The Department rendered its third advice letter on October 22, 1974, with regard to the construction permit application for the instant South Texas Project. In that letter of advice, the Department again noted that the situation involving limitations on membership in TIS had recently changed and that membership in TIS was being made available to other systems, and concluded that no antitrust hearing was warranted.

As noted above, the members of TIS operated wholly within the state and were not interconnected with systems outside the state. Thus, TIS members were not subject to regulation by the Federal Power Commission, (nor at the time, were they subject to any state regulatory authority). In our antitrust reviews of the previous applications, the Department had encountered no claim by any electric system that the intrastate only operation of HL&P or TU was having an anticompetitive effect.

2. *Market Conditions After 1974*

In the past, utilities in Texas have used natural gas as their main and sometimes only source of fuel to generate their power needs. The fuel situation in Texas has changed drastically since our prior letters of advice. The price of natural gas in Texas has increased substantially over what it was in 1973, and the use of natural gas as a boiler fuel must be cut back by 1985 to seventy-five percent of the greater of a utility's 1974 or 1975 consumption level. This changing fuel situation has had a significant impact on the competitive posture of the various utilities in Texas. While every utility has been faced with rapid increases in its costs of power, the smaller utilities dependent on natural gas have been the hardest hit. These utilities must switch to alternatives, such as coal, lignite, and nuclear fueled generation, if they are to continue in existence, let alone be able to compete with their larger neighbors, such as HL&P and TU. The switch from natural gas to an alternative fuel will require joint participation arrangements in large base load

generating resources, since economies of scale will play a much more important role than in the past. These resources must be tied together through transmission service arrangements or the construction of new transmission facilities.

In order to maintain their competitive viability these systems must engage in a degree of coordinated operation and development that has not hertofore existed in the state of Texas. This coordination cannot be done independently of the two dominant Texas utilities, HL&P and TU, without incurring substantially increased cost, decreased reliability and an erosion of the smaller utilities competitive capabilities.

Thus, in a very real sense the changing fuel situation in the State of Texas has increased the dominance of HLP and TU by increasing the dependence of smaller systems on the generation and transmission facilities of HLP and TU.

The monopoly power of HLP and TU was clearly evidenced by the consequences of their disconnection. During the period from May, 1976, to May, 1977, two separate systems operated in Texas: HL&P, TU and the smaller utilities within their service areas constituted a wholly intrastate interconnected system which operated effectively without significant electrical problems; the other system, which included three of the four participants in the South Texas Project (the cities of Austin and San Antonio, and CP&L) and a number of other utilities, operating in interstate commerce, encountered severe operating difficulties. Without the interconnections with HL&P and TU on the eastern end of the interstate system, reliability of the system suffered, spinning reserves had to be increased and the cost of power to these systems increased. In addition, as noted in our January 25, 1977, letter, utilities that were a part of the intrastate system, such as Brazos Electric Membership Cooperative, could not participate in planned joint generation with utilities that were a part of the interstate systems,

such as South Texas Electric Cooperative and Medina Electric Cooperative. Thus, members of TIS, as well as any smaller utility in the service area of a member of TIS, were unable effectively to plan and develop large scale bulk power generation, and particularly nuclear generation, either alone or in combination with other utilities, and opportunities to coordinate reserves and to engage in purchases, sales and exchanges of bulk power were restricted.

C. The Competitive Implication of the Intrastate Only Agreement Under Current Market Conditions.*

It is in the context of changed market conditions—the increased dominance of HL&P and TU, and the effects of their having exercised such power to refuse to deal with utilities operating in interstate commerce—that the intrastate only agreement of HL&P and TU must be analyzed. The clear intent of the agreement is to prevent the parties from entering into interstate commerce. The enforcement mchanism is the underlying right of the dominant utilities to refuse to deal with any utility that breaches the agreement. In short, it is this threat of boycott which reinforces the intrastate only agreement.

The competitive consequences of this agreement are the same as those that flow from any group boycott: actual and potential competition are injured. Actual competition suffers when existing systems are disconnected from HL&P and TU, as occurred during May, 1976-May, 1977. Potential competition is foreclosed by reason of adherence to the unconditional, across-the-board ban of all interstate connections regardless of their technological and economic feasibility.

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* This section analyzes the competitive ir. 'ications of a private agreement which includes as parties the dominant utilities in the State of Texas. The significance of the TPUC order, noted *supra*, which to some extent appears to presently supercede this agreement, is discussed in Section E, *infra*.

Because the intrastate only agreement has effectively precluded *serious* attempts to establish interstate connections, sources of potential competition must be inferred from facts showing the geographic proximity of interstate utilities, and the possible need or incentive to establish connections with such systems.

In the areas in which HL&P and TU face competition or could reasonably compete, there are a number of privately-owned and publicly-owned systems that generate and market electric power, and a number of distribution-only systems purchasing power at wholesale from one or more generation and transmission systems marketing firm bulk power. Some of these generating entities operate in interstate commerce, such as Southwestern Electric Power Co. (SWEPCO), Gulf States Utilities (GSU), Western Farmers Cooperative (in Oklahoma), and Southwestern Power Administration (an agency of the U.S. Government). These interstate system are sources of potential competition for the patronage of the approximately 150 distribution systems in Texas that purchase power at wholesale.

In addition to the potential for increased competition at the wholesale level, there appear to exist substantial opportunities for exchanges of power between the interstate and intrastate utilities.

Utilities in the South West Power Pool are faced with declining reserve margins and will need to purchase generating capacity to maintain adequate reliability until additional generation can be constructed. For example, Western Farmers Cooperative sought to purchase 300 to 400 mw of surplus generating capacity from TU but was unable to do so because of the intrastate only restriction. A number of the utilities in Texas, including competitors of HL&P and TU, have a surplus of generating capacity. The intrastate only policy of HL&P and TU would prevent any utilities with which they are interconnected from marketing any surplus capacity to the interstate utilities. For example, the

City of Bryan, Texas has recently installed a new generating unit bringing its total generating capacity to approximately 225 mw. On the other hand, because of its higher power cost the City is losing College Station as a wholesale customer. College Station represents approximately 27 percent of Bryan's electric load. The city's remaining customers will have to absorb the cost of this excess capacity if it is not sold, thus further eroding Bryan's ability to compete. Although Gulf States Utilities will have high voltage transmission lines in the area and may constitute a ready market for the capacity, the City would not be able to sell its surplus capacity to Gulf States without violating the intrastate only restriction and risking disconnection from the other members of TIS.

The intrastate only restrictions could also prevent municipal and cooperative systems in Texas from being able to receive an increased share of low cost Southwestern Power Administration (SPA) power should additional amounts of capacity become available. The SPA may also constitute a market for the surplus capacity noted above since, when it is faced with low water levels on its system, it must purchase deficiency power in order to meet its contractual obligations to its preference customers.

Thus the intrastate only restriction, by preventing utilities within the Texas intrastate system from engaging in power exchange transactions with utilities outside the intrastate system, could foreclose acess to a substantial part of the market for power exchange services.

Given current market conditions the intrastate only agreement may serve to unreasonably foreclose a significant degree of potential competition. The nature and extent of such foreclosure can only be established after a full evidentiary proceeding.

So long as HL&P intends that the operation of the jointly-owned South Texas Project be in accordance with the terms of the intrastate restrictions imposed by HL&P

and the TU system, HL&P's activities under the nuclear license in furtherance of that restriction can maintain and enhance a situation inconsistent with the antitrust laws contrary to section 105 of the Atomic Energy Act.

D. Additional Points Raised in Your Letter Requesting Advice

In your letter of August 25, 1977, you requested that the Department provide "an evaluation of the legal significance of the various facts and contentions dealt with in the Attorney General's letter of January 25, 1977."

At the time of the Department's letter of January 25, 1977, HL&P and TU, the two dominant utilities in Texas, were refusing to interconnect with other utilities (utilities with which they had historically maintained interconnections); that refusal was having a direct and substantial adverse effect on those utilities' power supply costs, reliability and their ability to remain competitive.

HL&P's refusal to deal with any interstate system went beyond a mere unilateral announcement of its decision to that effect. See *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960); *Albrecht* v. *Herald Co.*, 390 U.S. 145, 149-150 (1968). Its action was part of a course of conduct whereby HL&P had joined with the other dominant system within Texas to use their combined power to require other electric utility systems to act in accordance with their direction. The concerted action by HL&P and TU deprived competitors of a valuable business service needed in order to compete effectively and thus raised serious antitrust issues which the Department viewed as warranting a hearing. *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1969); *Associated Press* v. *United States*, 362 U.S. 1 (1945); *Eastern States Retail Lumber Dealers' Ass'n* v. *United States*, 234 U.S. 600, 612 (1914).

Your letter of August 25, 1977 also asks that the Department "advise as to why enforcement of a contract right,

known to all parties and the Assistant Attorney General at the time of the construction permit antitrust review, may constitute 'changed circumstances' such as may justify the imposition of antitrust conditions."

While the Department was aware of the existence of the interstate only restrictions at the time of its prior advice, the Department was not aware of any anticompetitive effect or anticompetitive injury resulting from those restrictions. Nevertheless, the Department did recognize that possible antitrust consequences might flow from such restrictions and included in condition 11 of the Comanche Peak construction permit a statement that continuance of the policy [of intrastate only operation] was not to be interpreted to reflect any view as to the "legality or propriety of said policy."

Iin evaluating the competitive significance of any course of conduct, careful attention must be given to the commercial context within which that conduct occurs. Changed circumstances necessarily imply that, where a provision may be seen to have had a neutral impact in one set of circumstances, a change in those circumstances later on may reveal the anticompetitive nature of the same provision. The changed circumstances described above show very significant anticompetitive effects have arisen since the Department's original advice letter. While HL&P did not cause, or cannot be held answerable for the increased costs of fuel to its competitors, HL&P is the cause and is answerable for the adverse effects of disconnecting from the smaller competitors that were operating in interstate commerce. Moreover, the basis for such action derived from the intrastate only agreement. Thus, on the basis of events occurring after the Department's original advice letter it can now be clearly seen that, with the increased importance of economic coordination brought about by the fuel situation, and the corresponding increased need and opportunity for coordination between interstate and intrastate utilities, HL&P, together with TU, by agreeing not to interconnect

with utilities operating in interstate commerce have the power to and may adversely affect the future competitive situation, in or contiguous to the state of Texas, both between the intrastate systems and between the interstate and intrastate systems.

Certainly, as a matter of law, the Commission is not foreclosed from considering at this time the intrastate only restrictions. The mere fact that the Commission may conclude at any particular point in time that antitrust enforcement action is not advisable does not foreclose it from subsequently acting to confront a situation it then finds to be inconsistent with the antitrust laws if it otherwise has jurisdiction to act. *U.S.* v. *New Orleans Chapter, Associated General Contractors of America, Inc.*, 382 U.S. 17 (1965). Not even trade arrangements which have been long tolerated thereby require any vested immunity under the Sherman Act. *Times-Picayune Publishing Co.* v. *U.S.*, 345 U.S. 594 (1953). Even contemplated actions, such as mergers, once examined and not contested, can later be challenged if the dictates of the public interset (sic) so require. *U.S.* v. *Jos. Schlitz Brewing Co.*, 253 F. Supp. 129 (N.D. Cal. 1966) *Aff'd*, 385 U.S. 37 (1966).

In the Department's letter of January 17, 1974, pertaining to the Comanche Peak Generating Station, it was expressly indicated (in condition #11 of that license) that no view was then being taken as to the legality of the policy foreclosng (sic) transmission of power in interstate commerce. As the court noted in *U.S.* v. *Grinnell Corp.*, 30 F.R.D. 358 (D. R.I. 1962), whenever the Government reserves its future right to take action, any such communication of policy is not a final disposition of the matter at issue. Put succinctly, the obligation to protect the public interest can never be estopped by inaction at an earlier point.

E. The Proceedings in Other Forums

Your letter of August 25 finally asks that the Department provide "an evaluation of the probable effects of proceed-

ings in other forums, as they have then progressed, in developing his [our] recommendations concerning further antitrust hearings." There are four proceedings in other forums, *i.e.,* the Securities and Exchange Commission (SEC), the Federal Power Commission (FPC), the U.S. District Court in Dallas, Texas, and the Texas Public Utility Commission (TPUC), whose impact must be analyzed.

The proceeding before the SEC commenced in 1974 after several Oklahoma cooperatives and municipalities complained that the operating subsidiaries of Central and South West Corporation (C&SW), which include CP&L and WTU, were not operationally integrated and, therefore, were in violation of the Public Utility Holding Company Act of 1935. The SEC instituted hearings which, under the statute, involve as the sole issue:

> Whether the electric utilities facilities of subsidiaries of Central and South West Corporation supplemented as planned or proposed are capable of being economically operated as a single integrated and coordinated system and whether the proposals presented by Central and South West Corporation and its subsidiaries, with any amendments or modifications which may be developed during the proceeding, represent a reasonable prospect of achieving such economical operation, and what contingencies, if any, may affect carrying out any of such proposals.

Although HL&P and TU are participating in the hearings, it is clear that the SEC has no statutory authority to require that HL&P implement any interconnection plan with CP&L or any other utility; and that it cannot affect the competitive situation in Texas. Moreover, the SEC could not interfere with the NRC's power to remedy anticompetitive situations. Thus, it is our view that the SEC proceeding has no bearing on the question of whether an antitrust hearing before the NRC is necessary.

A proceeding before the FPC (now FERC) was initiated when CP&L filed a petition in May 1976, requesting the FPC to find that CP&L, WTU, TU and HL&P were operating in interstate commerce and thus were all under the jurisdiction of the FPC. This contention was grounded on the fact that these systems had been interconnected for approximately eight hours, during which time WTU transmitted power across the Texas border into Oklahoma. The FPC issued an order, finding that, *inter alia*, CP&L and WTU were jurisdictional but that TU and HL&P were not.* This decision is on appeal to the U.S. Court of Appeals, D. C. Circuit. Should the Court of Appeals reverse and hold that HL&P and TU are subject to the jurisdiction of the FERC then, as a practical matter, the intrastate only policy of these parties will have been ended. On the other hand, a more likely course for the Court, if it does not affirm, would be to remand to FERC for an evidentiary hearing. Neither affirmance nor remand would relieve the NRC of its statutory duty to remedy an anticompetitive situation nor preclude the Commission from doing so. The Department views the outcome of the FERC proceeding as too speculative to warrant much weight in our recommendation.

The third proceeding involves a civil complaint which has been filed by CP&L in the U.S. District Court in Dallas, Texas. CP&L alleges that HL&P and TU, by refusing to deal with utilities in interstate commerce, have engaged in a conspiracy in violation of Section 1 of the Sherman Act and an attempt to monopolize in violation of Section 2 of the Sherman Act. The legality of the intrastate only agreement is squarely before the district court. It is conceivable, therefore, that the court could find such agreement unlawful and enter a permanent injunction against it. In that

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* The FPC, in a later order denying a petition for reconsideration, specifically declined to consider antitrust issues that CP&L sought to raise.

event, NRC action might become unnecessary. On the other hand the proceeding involves two groups of large investor-owned systems each seeking to protect its own private corporate interests. They might settle their differences without resolving any of the antitrust concerns raised by the Department. Moreover, even if the defendants prevail in the district court the question of the legality of intrastate only agreements would not be settled since both the parties and legal standards are different in that case than they would be before the NRC.

While this is the only proceeding which may consider some of the same issues as would be raised before the NRC, we cannot be certain that a decision of the District Court will be dispositive. The Department believes it would be unwise and inappropriate for the NRC to defer to the district court proceeding. It must be remembered that this—the operating license stage—is the last opportunity that the NRC has to carry out its statutory mandate to use its licensing authority to prevent the creation or maintenance of a situation inconsistent with the antitrust laws. If the Commission fails to act now it runs the risk of facing an unremediable anticompetitive situation in the future.

A fourth proceeding arose before the TPUC. Until the TPUC was formed in 1976, electric utilities in Texas were not subject to any statewide regulatory agency and, outside of retail rate regulation by the governing body of the municipalities within which it operated, an electric utility was essentially unregulated.

In January of 1977, HL&P and other utilities in the TIS area petitioned the TPUC, to require WTU and CP&L to cease interstate operation and to reconnect with the interstate utilities. The TPUC, on May 2, 1977, without any hearings and contrary to its findings of the year before,*

* After a one day hearing in May of 1976, the TPUC made a finding that the situation, with HL&P and TU disconnected from

found that the then existing situation, with WTU, CP&L and the three public systems operating disconnected from TU and HL&P. was having an adverse impact on the power supply situation in Texas, both in terms of reliability and cost of power. An order was issued requiring WTU to cease transmission of power into the state of Oklahoma and for WTU and CP&L to reestablish interconnection with TU and HL&P. The TPUC thereafter held hearings and, by an amended final order dated July 11, 1977, confirmed its earlier order of May 2, 1977.

The final amended order prohibits all TIS members from disconnecting without TPUC authorization and further restrains any utility system connected with TIS from making connections with utility systems not so connected, unless authorized by Texas law or so ordered by the FPC or the TPUC. The order also provides that TPUC decisions on applications seeking relief from these prohibitions are to be governed by a public interest standard.

CP&L has appealed the TPUC order to the Federal District Court in the Western District of Texas and to a state court. It has not yet been decided which court will ultimately act on the appeal.

At the present time, it is clear that to some extent the TPUC order has superceded, but not validated, the intrastate only agreement of the private utilities. The agreement is superseded in the sense that it is no longer the sheer economic power of the parties but rather the force of state law that restrains members of TIS from entering into interstate commerce. The agreement is not validated, however, since the TPUC expressly disclaimed any jurisdiction to determine whether the subject contracts were

the other TIS members, was not adversely affecting the reliability of any of the utilities. No determination was made as to any economic or competitive effects on any of the utilities.

void or voidable. Therefore, while presently supplanted by a TPUC order, the private intrastate only agreements remain in existence and are capable of future implementation.

There are two reasons why the NRC ought to order an antitrust hearing in spite of the TPUC order. First, the Commission is confronted with a private agreement that raises serious competitive issues, that has not been abandoned by the parties and that has yet to be enjoined or declared unlawful. There is a real question as to whether the TPUC restraint on interstate connections is valid under the Commerce Clause of the United States Constitution. (Art. 1, Section 8, Clause 3)* If on review, a court should abrogate that portion of the TPUC order, the TPUC might lift its injunction against disconnections from TIS. The point is simply that the private agreement may again become fully operative.

Given that the NRC has a non-delegable statutory responsibility to use its licensing authority to prevent the creation or maintenance of a situation inconsistent with the antitrust laws, it cannot ignore or look to others to prevent or correct an anticompetitive situation. Moreover, under its June 11, 1977, Order in which it held itself to have only limited continuing antitrust authority the Commission will have no *later* opportunity to exercise its power since its jurisdiction to act is confined to the licensing stages.

Second, the TPUC may enforce its order in a manner which basically vindicates the operation of the intrastate only agreement. Arbitrary denials of applications for interstate connections can have the same anticompetitive ef-

* See *Penn.* v. *West Virginia* 262 U.S. 533 (1923); *FPC* v. *Corporation Commission of the State of Oklahoma,* 362 F. Supp. 522 (W.D. Okla. 1973) (Three Judge Court), *Sum, aff'd,* 415 U.S. 961 (1974).

fects as those that result from the threat of boycott. While we do not assert that the TPUC will act arbitrarily we also do not believe that the NRC can ignore its responsibility to protect interstate commerce from unreasonable competitive restraints—even those imposed by a state agency. The NRC can prevent the TPUC from improperly restricting competition by exercising its authority to condemn the intrastate only agreement and by reserving in license conditions the right to review and to countermand unreasonable refusals or failures to interconnect with utilities operating, or desiring to operate in interstate commerce, even where such actions are the result of TPUC decisions. This would not place the NRC in conflict with the TPUC since the Texas Public Utility Regulatory Act expressly provides that "No rule or order of the regulatory authority shall be in conflict with the rulings of any federal regulatory body."*

F. Conclusion

In view of the above legal and factual analysis, and the inability of the Department to conclude that the same issues raised herein will necessarily be resolved satisfactorily in another forum, the Department renews its advice that an antitrust hearing be held on the applicant's operating license. The purpose of the hearing would be to determine whether in order to remedy a situation inconsistent with the antitrust laws HL&P should be precluded from adhering to the intrastate only agreement or from unreasonably refusing to engage in interstate connections. At the time of the hearing, the Department of Justice may wish to participate to elaborate upon its views expressed in this letter,

* Public Utility Regulatory Act, Tit. 32, Art. 1446(c), § 37 V.A.C.S.

to offer evidence, to connect up legal theories and to evaluate and respond to submissions made by the parties.

Sincerely yours,

/s/ JOHN H. SHENEFIELD
John H. Shenefield
Assistant Attorney General